1985

Book Review: Constitutional Faiths: Felix Frankfurter, Hugo Black, and the Process of Judicial Decision Making. by Mark Silverstein.

Philip B. Kurland

Book Reviews

CONSTITUTIONAL FAITHS: FELIX FRANKFURTER, HUGO BLACK, AND THE PROCESS OF JUDICIAL DECISION MAKING. By Mark Silverstein.[1] Ithaca: Cornell University Press. 1984. Pp. 234. $24.95.

Philip B. Kurland[2]

Felix Frankfurter once remarked, "Chief Justices of the United States are rarer than Presidents. A Chief Justice cannot escape history."[3] Since this observation appeared in an encomium to Harlan Fiske Stone, its sentiment may have been more appropriate than its substance is true. The fact is that chief justices' names—John Marshall's excepted, of course—go down in history more as labels for the Courts over which they presided than because of the personal contributions they may have made to constitutional jurisprudence. Except for Marshall, none of the fifteen chief justices was the dominant figure on the Court over which he presided. (Strong as he was, Charles Evans Hughes was not the leader of the Court of his period.) It must be remembered that the "authors" of Supreme Court opinions purport to express the views of the majority, not merely their own. The style of an opinion is idiosyncratic, but its substance is syncretic.

If, however, the judgment of history is to be found in the burgeoning literary genre of judicial biography, it may be that chief justices dominate. Like most biographies, judicial biographies tend to be paeans to their subjects. They exalt their protagonists' virtues, ignore their failings, and exaggerate their influence. Disinterestedness is as rare among biographers of judges as it is now rare in the work of the jurists themselves.

The subjects of this book, Hugo Black and Felix Frankfurter, possessed much stronger intellects than either Fred Vinson or Earl Warren, and were certainly the peers of Hughes and Stone. If it cannot be said that they controlled the decisions of their Courts, it

1. Assistant Professor of Political Science, Boston University.
2. William R. Kenan Distinguished Service Professor, University of Chicago.
3. FELIX FRANKFURTER ON THE SUPREME COURT 442 (P. Kurland ed. 1970).

can be said with little doubt that they were largely responsible for the framing of the issues that their Courts addressed.

It has been wisely said that:

> The qualities that make for greatness in judges are elusive and the subject of debate. One thing that is certain is that there is no strong correlation between judicial eminence and the ability to win support from colleagues on the bench; on the contrary, many of the ablest and most renowned judges are frequent dissenters. Usually the great judge's impact on law is a long-range one because he is an innovator challenging the legal status quo.[4]

There is, however, one consistent if not sufficient condition for entry into the judicial hall of fame and that is longevity of service. Both Black and Frankfurter were among the long-tenured justices of the high court.

There is judicial biography in this volume, but there are no signs of hagiography. The first half of the book is devoted to two essays describing the pre-judicial lives, first of Frankfurter and then of Black. Remarkably for this day, the author eschews the pseudoscientific psychoanalytic approaches that have so recently flooded the literature, although he is careful not to denigrate such an approach.[5] Equally rare is Silverstein's avoidance of the gossip and sensationalism of pseudoscholars who would rather be Woodward and Armstrong than academics. Intellectual analysis rather than ideological commitment marks the work and makes it interesting and informative. The book is not summertime hammock reading to titillate the uninformed. It is a serious work for serious students. This does not mean that it is a pedant's product. If it still bears some of the stigmata of a doctoral dissertation, it remains remarkably good reading that is not dependent on the scholarly paraphernalia for its cogency.

The essential question addressed is how the democratic faiths of the two justices were tested in the creation and application of constitutional values in the course of adjudication. Both justices were deeply committed to a faith in democracy, but they were members, so to speak, of different sects of that faith. Of Frankfurter, Silverstein perceptively tells us:

> Thus by the eve of his appointment to the Court, Frankfurter had a clearly established, idealized political picture of American democracy. Firm in his belief that politics was a continual process of education, he refused to justify the state as merely a referee presiding over the clash of partisan interests and groups, rather, it was a harmonious machine, powered by a faith in education and the public interest, slowly progressing toward commonly held goals. At the very center of

4. M. SCHICK, LEARNED HAND'S COURT 23 (1970).

5. M. SILVERSTEIN, CONSTITUTIONAL FAITHS: FELIX FRANKFURTER, HUGO BLACK, AND THE PROCESS OF JUDICIAL DECISION MAKING 217 (1984).

> his democratic faith was a confidence in the average citizen's ability, *given the right leadership*, to forsake individual interests and to sanction, through the democratic process, action in furtherance of the public interest.[6]

If Frankfurter's political experiences can be said to have been at the general staff level as confidant of governors and cabinet officers and even presidents, Hugo Black's were clearly on the line: at the hustings, within the Democratic party in Alabama, and later in the United States Senate. If political party was irrelevant to Frankfurter's conception of democratic reform, for Black only the Democrats were the vehicle to this end. In Silverstein's words:

> To develop from that Jeffersonian tradition a theory of the use of power to combat private power was the dilemma common to American reformers at the turn of the twentieth century. . . .
>
> Before his appointment to the Court, Black, unlike Frankfurter, never developed a coherent theory to justify the use of public power as a means of reform. . . . Confined by a political understanding that would not permit a third party movement, Black's reform instincts were limited by the realities of the Democratic party.
>
> Although Black increasingly viewed Congress as the means by which political power could be employed on behalf of the many, he had a consistent distrust of the use of power that Frankfurter lacked. Frankfurter fashioned a political theory that appeared to satisfy his democratic faith and realities of the political world. Although Black had a clearly developed understanding of the polity, before his appointment to the Court he was unable to formulate a coherent political theory based upon that political vision. Black's ideal state—strong enough to control private concentrations of power but not strong enough to destroy personal freedom—reflects his ambiguity about power. Ultimately Black feared both private power and the growth of public power. It was the continuing, unresolved ambiguity concerning private and public power that was to mark his initial years on the bench.[7]

Of course, these synopses are oversimplifications. Both justices were sophisticated. They were prepared to grant more leeway to conglomerates of labor than to conglomerates of capital. Black was more truly the Jeffersonian in his respect for federalism than was Frankfurter and so, too, was he more dubious about concentration of power in the executive. The legislature was, for him, the democratic branch of government, and in democracy was to be found our salvation.

The two democratic faiths were to be tested again and again in the work of the Court. To reconcile judicial review with democratic principles required constant adjustments of beliefs: judicial review is not reconcilable with democratic concepts of self-government. Judicial review is a restraint on democracy, imposed by a politically irresponsible judiciary, unelected, irremovable, and

---

6. *Id.* at 88. The italics are mine, but the emphasis is Silverstein's and is pervasive.
7. *Id.* at 125-26.

independent because otherwise the restraints of the Constitution could become meaningless.

The second part of the book is devoted to measuring Black's and Frankfurter's democratic faiths as they were displayed in some of the important areas of constitutional law during their joint tenure. The comparative technique proves a fruitful one. It has been essayed once before with the same principals and pretty much the same issues in Professor Wallace Mendelson's 1961 book *Justices Black and Frankfurter: Conflict on the Court.* But the objective there was different. Mendelson sought to show that Frankfurter was right and Black was wrong. Silverstein attempts no such Jovian perspective. He credits the good faith of both jurists and tries to reveal how each justice's principles led him to his results. He does not expect, nor does he find, the kind of consistency that a true ideology would have dictated. But neither of the subjects was a rigid ideologue in the European sense. And Silverstein perceives what so many political scientists do not: "Despite frequent scholarly attempts to study judges in a manner similar to the study of other political actors, judges are different and studies of judicial behavior must account for their differences."[8]

Black and Frankfurter were antagonists, but they respected each other and respected the limitations of their office. Thus, they were joined in a way that separated them from a justice like William O. Douglas. In voting behavior, Douglas and Black were often allied against Frankfurter. But Douglas did not share Black's notion of the limited nature of the judicial power and he frequently questioned the good faith of those with whom he disagreed.

Silverstein's conclusion is worth quotation:

> The American judicial tradition is marked by ambiguity. Principally this is the case because we are a nation that is at once liberal and democratic, and we expect judges to be faithful to both traditions. It is, perhaps, an unrealistic expectation, and thus it is hardly surprising that after two hundred years the judiciary is still a subject of intense controversy and debate. In the final analysis, the judicial role remains ambiguous for judge and citizen alike.
>
> Frankfurter and Black are symbolic of that tradition. Fearful of judicial tyranny, each sought in highly developed role orientations with roots deep in American political and social thought the means to ensure disinterested decision making. Each continually sought to harmonize judicial review with its democratic setting, and each strove to remove from the judicial process the vagaries of personal preference. Each ultimately was guided in his task by a single-minded devotion to the Constitution and the ideal of the rule of law.[9]

---

8. *Id.* at 208.

9. *Id.* at 219. As a long-time "Frankfurterian," I am tempted to concede that Silverstein was more generous to Frankfurter's professions of judicial restraint than was justified.

This book is different from most judicial studies that we have been getting. You don't have to accept the author's conclusions. But certainly he has adduced strong evidence in support of them. And if you are tired of tirades, glutted with gossip, sick of sycophancy, here is some plain talk by an author who seems to know what he is talking about.

Although Black was often remiss in adhering to his "strict" readings of the due process and equal protection clauses, Frankfurter's willingness to treat them as open-ended incorporations of the sounder values of our civilization brought with it an enormous authority for the judiciary. On the other hand, I suppose that "the ideal of the rule of law" was more in keeping with Frankfurter's jurisprudence than Black's.